Office-Supreme Court, U.S.
FILED
MAY 5 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1640, 80-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY, *Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER, *Respondents.*

OPPOSITION TO THE PETITIONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL P. SHEEHAN
Counsel of Record
ROBERT HAGER
Christic Institute
1324 N. Capitol St.
Washington, D.C. 20002
(202) 797-8106
Counsel for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred when it ruled, below, that sentence four of the 1962 amendment to §189(a) of the Atomic Energy Act gave no authority to the petitioning Nuclear Regulatory Commissioners to deny the Respondents the public hearing which Respondents had formally requested *before* the Commissioners finalized an amendment to the operating license of the Three Mile Island Nuclear Reactor and allowed the licensee to complete action pursuant to said amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF RESPONDENTS' ARGUMENTS AS TO WHY THE WRIT SHOULD NOT BE GRANTED	6
RESPONDENTS' DETAILED ARGUMENTS:	
ARGUMENT I	7
THE 87th CONGRESS WHICH AMENDED §189(a) OF THE ATOMIC ENERGY ACT IN 1962 INTENDED TO ELIMINATE PUBLIC HEARINGS PRIOR TO THE FINALIZATION OF PROPOSED AMENDMENTS TO OPERATING LICENSES OF NUCLEAR FACILITIES *ONLY* IN THOSE INSTANCES IN WHICH PROPOSED LICENSE AMENDMENTS WERE "UNCONTESTED" BY PERSONS WHOSE INTERESTS MIGHT BE AFFECTED BY SUCH AMENDMENTS	
ARGUMENT II	12
SENTENCE FOUR OF THE 1962 AMENDMENTS TO THE ATOMIC ENERGY ACT OF 1954 WAS INTENDED BY CONGRESS TO AUTHORIZE, UPON A FINDING BY THE NRC STAFF THAT A PROPOSED LICENSE AMENDMENT INVOLVED "NO SIGNIFICANT HAZARDS CONSIDERATION," *ONLY* THE ELIMINATION OF THE FULL *30 DAY* NOTICE AND PUBLICATION PERIOD REQUIRED BY THE EARLIER ACT TO PRECEED ACTION BY THE LICENSEE PURSUANT TO THE PROPOSED AMENDMENT—"IN THE ABSENCE OF A REQUEST FOR A HEARING"	

Table of Contents Continued

Page

ARGUMENT III 15

THE CIRCUIT COURT OF APPEALS BELOW ACCORDED THE HISTORICAL INTERPRETATION GIVEN TO §189(a) OF THE ATOMIC ENERGY ACT BY THE NUCLEAR REGULATORY COMMISSION ADEQUATE LEGAL CONSIDERATION

ARGUMENT IV 16

THE PRACTICAL IMPACT OF THE CIRCUIT COURT'S DECISION BELOW IS MISREPRESENTED, AND THEREBY VASTLY OVERSTATED, BY THE NRC AND DOES NOT AFFORD THE PETITIONERS ANY SUPPORT FOR THEIR DEMAND THAT THIS COURT REVIEW, AND REVERSE, THE CIRCUIT COURT'S DECISION BELOW

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:	Page
Brooks v. *Atomic Energy Commission*, 476 F.2d 924 (D.C. Cir. 1973)	7
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1933)	16
People Against Nuclear Energy, Steven Sholly and Donald E. Hossler v. *United States Nuclear Regulatory Commission, the United States of America, Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company*, ___ F.2d ___, (D.C. Cir. 1980) (Petition of NRC, Appendix A, pp. 1a-27a)	1
STATUTES, RULES AND REGULATIONS:	
Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*: §189(a), 42 U.S.C. 2239(a) as amended	*passim*
28 U.S.C. 1254(1)	2
10 C.F.R. 50.59, published on June 9, 1962 at 27 Fed. Reg. 5492-5493	10
CONGRESSIONAL REPORTS AND HEARINGS:	
AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcommittee on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2nd Sess. 64 (1962) (Statement of Raoul Berger)	13
H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962)	9
S. Rep. No. 1677, 87th Cong., 2d Sess. (1962)	9
Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1640, 80-1656

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY, *Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER, *Respondents.*

OPPOSITION TO THE PETITIONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

People Against Nuclear Power, Steven Sholly and Donald E. Hossler ("Respondents") hereby oppose the Petition For The Issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cause of action.[1]

[1] Petitioners in the Court of Appeals, (Respondents in this Court) were People Against Nuclear Energy, Steven Sholly and Donald E. Hossler. Respondents in the Court of Appeals, (Petitioners in this Court,) were the five Commissioners of the Nuclear Regulatory Commission: Joseph M. Hendrie, John Aherne, Victor Gilinsky, Richard T. Kennedy and Peter A. Bradford; the Nuclear Regulatory

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit from which appeal is sought before this Court is not yet published. A copy of this opinion is, however, included in the Petition for Certiorari submitted to the Court by the Nuclear Regulatory Commission in Appendix A, pp. 1a-27a.

The Court of Appeals Order denying the Petitioners' suggestion for a rehearing *en banc*, and the Statement on Denial of Rehearing *En Banc* by some members of the Court below is also unpublished. Copies of these filings are also included in the Petition for Certiorari filed by the Nuclear Regulatory Commission in Appendix B, at pp. 28a-29a and pp. 30a-46a respectively.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 19, 1980. A Petition for Rehearing and a Suggestion for a Rehearing *En Banc* were denied on March 4, 1981. The jurisdiction of the Supreme Court is invoked by the Petitioners under 28 U.S.C. 1254(1).

Commission; the United States and the Intervenor-Respondents-Licensees below Metropolitan Edison Co., Jersey Central Power & Light Company and Pennsylvania Electric Company. The Respondents have used the caption for this case selected by the Petitioning NRC, though the individual Commissioners should also be included in the caption.

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. §2239(a), provides, in pertinent part, as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit *** the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application ***[T]he Commission may, in the absence of a request therefore by any person whose interest may be affected, issue *** an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for *** an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT OF THE CASE

This case constitutes an effort on the part of the five Commissioners of the United States Nuclear Regulatory Commission and the Licensees of the now infamous Three Mile Island Nuclear Reactor in Harrisburg, Pennsylvania to overturn a unanimous ruling by a three judge panel of the United States Court of Appeals for the District of Columbia Circuit[2] declaring that the Nuclear Regulatory Commissioners are required by law to afford to

---

[2] This panel was comprised of Chief Judge J. Skelly Wright, Judge Abner Mikva and Judge Harry T. Edwards.

any person whose interest may be affected by a proposed amendment to an operating license of a nuclear reactor a public hearing — once such a public hearing has been formally requested by such person — and that this public hearing must be held *prior to* the Commissioners' rendering such a proposed amendment final by allowing the Licensee to undertake action pursuant to such amendment.

The Respondents before the Court in this case agree with the Circuit Court below and argue to this Court that "persons whose interests may be affected by" such a proposed amendment or modification of the operating license of a nuclear reactor have a legal right to a public hearing *before* such an Order can lawfully be finalized by the Commissioners — if such persons formally contest such an amendment and demand such a public hearing before the licensee undertakes action pursuant to such proposed amendment. The Circuit Court below ruled that the right to such a demanded prior public hearing is specifically recognized in §189(a) of the Atomic Energy Act of 1954.[3]

The Nuclear Regulatory Commissioners, and the Licensees of the Three Mile Island Nuclear Reactor, argued below, and they reargue again before this Court, that the 87th Congress expressly *took away* this right to a demanded prior public hearing on proposed nuclear operating license amendments in 1962, when the Congress

---

[3] The Respondents before this Court maintain that they also have a *constitutional* right to such prior notice and a prior public hearing before the NRC Commissioners can finalize an amendment to the operating license of a nuclear facility which (a) authorizes the venting of radioactive gas from a nuclear reactor directly into their neighborhoods, which venting is expressly forbidden under the operating license which is being amended by the proposed Order and

amended the Atomic Energy Act of 1954 to allow the Nuclear Regulatory Commission to waive the full 30-day notice and publication period before authorizing licensees to undertake action pursuant to a proposed license amendment which was *uncontested* by citizens if the NRC staff made a determination that said license amendment involved "no significant hazards consideration."

The Petitioners ground their repeated contention in two separate "legislative history interpretation" arguments. Both of these arguments are addressed by the Respondents below.

The Petitioners also raise two other arguments in support of their demand that the Supreme Court review, and reverse, the Circuit Court's ruling below. These are: (1) that the Circuit Court below did not give "due deference" to the allegedly clear and consistent historical interpretation given by the Nuclear Regulatory Commission to what the NRC charges is an inherently ambiguous Congressional statute and (2) that the functional impact of the Circuit Court's decision below will be to require full public hearings on all proposed amendments to nuclear plant operating licenses which the NRC staff declare to involve no significant hazards consideration — and that such hearings will constitute a "monumental disruption of the Commission's license review process" while yielding no added protection to the health and safety of the public.

---

which, (b), amends the operating license to authorize the licensee to release radioactive gas from a nuclear reactor directly into their neighborhoods at a rate which had never been allowed under the facility's operating license. The Circuit Court below, while recognizing the existence of this potential constitutional right, did not pass upon this question in the decision below. (See NRC Petition, Court's Opinion, App. A pp. 16a-17a, Fn. 20).

The two arguments are also addressed by the Respondents below.

SUMMARY OF RESPONDENTS' ARGUMENTS AS TO WHY THE WRIT SHOULD BE DENIED

The Respondents argue before this Court, first, that the 87th Congress which passed the 1962 amendment to §189(a) of the Atomic Energy Act intended to authorize the NRC to render final a proposed amendment to an operating license of a nuclear reactor without holding a prior public hearing on such proposed amendment *only* in those instances when the proposed license amendment was *uncontested* by persons whose interests might be affected by such amendment.

Respondents argue, secondly, that "sentence four" of the 1962 amendment of the Atomic Energy Act was intended by the 87th Congress to authorize — upon a specific finding by the NRC staff that a proposed operating license amendment involved no significant hazards consideration — *only* the waiver of the *full 30-day* notice and publication period which was mandated in the 1954 Act to expire before the NRC could authorize the licensee to undertake activity pursuant to said license amendment — *in the absence of a request for a hearing.*

Respondents argue, thirdly, that the Circuit Court below accorded all the deference that was legally due to the NRC's historical interpretation of §189(a) in light of the lack of clarity of that historical interpretation and in light of the clarity of the wording and legislative intent of §189(a) insofar as the narrow issue before the Court was concerned.

Finally, the Respondents argue that the Petitioners grossly misrepresent, and thereby vastly inflate, the functional impact on the operations of the Nuclear Regu-

latory Commission of the decision of the Circuit Court below and that, therefore, the Petitioners' foreboding of regulatory paralysis, which they say will be imposed upon the NRC by the Court's decision, must be disregarded by the Court as a reason for reviewing, and reversing, the Circuit Court opinion below.

ARGUMENT I

THE 87TH CONGRESS WHICH AMENDED §189(a) OF THE ATOMIC ENERGY ACT IN 1962 INTENDED TO ELIMINATE PUBLIC HEARINGS PRIOR TO THE FINALIZATION OF PROPOSED AMENDMENTS TO OPERATING LICENSES OF NUCLEAR FACILITIES *ONLY* IN THOSE INSTANCES IN WHICH PROPOSED LICENSE AMENDMENTS WERE "UNCONTESTED" BY PERSONS WHOSE INTERESTS MIGHT BE AFFECTED BY SUCH AMENDMENTS

The United States Court of Appeals for the District of Columbia Circuit, in 1973, undertook a thorough historical analysis of the legislative history of the 1962 amendment to the Atomic Energy Act of 1954. This was done in preparation of its opinion rendered in *Brooks* v. *Atomic Energy Commission,* 476 F.2d 924 (D.C. Cir. 1973). Because the Court had "previously rejected *the very construction* of §189(a) offered by the NRC and the licensee" in the case below in its final opinion in *Brooks,* the Circuit Court ruled below, that the doctrine of *stare decisis* compelled it to rule, in this case, that the NRC Commissioners had acted illegally when they refused to provide the Respondents in this case with their demanded public hearing. (Circuit Court opinion, NRC Petition, App. A, pp. 15a-16a).

There the Circuit Court stated:

> This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks* v. *Atomic*

> *Energy Commission*, 476 F.2d 924, 926 (D.C. Cir. 1973) (per curiam), this court soundly rejected the contention that the fourth sentence in §189(a) "indicated Congressional intent to dispense with hearings in construction permit amendment proceedings . . ." when the Commission determines that the amendment involves "no significant hazards consideration." Instead, this court, after an examination of the legislative history of §189(a), held that the fourth sentence only dispenses with requirements of notice and publication. (Id., p. 15a)

The Circuit Court went on, in the case below, to undertake, for the Petitioners here, a *re*-review of that legislative history of §189(a), at pp. 16a-22a of its opinion, and ruled, more specifically, that the legislative history of §189(a) made it abundantly clear that the 1962 amendments to §189(a)

> had their origin in Congressional concern over a hearing requirement in *uncontested* cases — that is, when a hearing had not been requested. (Id., p. 17a)

In fact the Circuit Court below pointed out that the Petitioner, Metropolitan Edison Company *itself*, in 1961, had specifically testified before the Joint Committee on Atomic Energy of the 87th Congress and had explicitly acknowledged that the amendment to §189(a) that was being discussed expressly intended to retain a hearing requirement whenever a hearing was actually requested. Counsel for the Petitioner, Metropolitan Edison Company, stated, at that time, that:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirement of §189(a), *leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceeding.* (citing) Radiation Safety and Regulation: Hearings Before the

> Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge) (Id., pp. 17a-18a, Fn. 21) (emphasis added)

Metropolitan Edison, and, indeed, Mr. Trowbridge *himself*, now appear before this Court and, rather surprisingly, it would seem, insist that it has always been clearly understood by the Petitioners that the 87th Congress which passed the 1962 amendments to §189(a) of the Atomic Energy Act expressly intended to *strip* the public of their right to a public hearing prior to making such proposed license amendments final whenever the NRC staff internally decided that the proposed license amendment at issue involved no significant hazards consideration.

It is difficult, indeed, for the Respondents to improve significantly upon the review of the legislative history undertaken by the Circuit Court in its opinion below. For this reason, this full review is included herein, by reference, by the Respondents.

The NRC and the licensees of Three Mile Island protest, however, that the Circuit Court below ignored a solitary piece of legislative history relating to the amendment of §189(a) on which they base their entire "legislative history" argument to this Court. This piece the Petitioners set forth for this Court at page 12 of the NRC's Petition. This proffered legislative history is a single line of one statement contained in the Congressional Joint Committee Report on the 1962 bill which amended §189(a) of the Atomic Energy Act. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962) and H.R. Rep. No. 1966, 87th Cong., 2nd Sess. (1962), at page 8.

This single line of legislative history cited by the Petitioners makes oblique reference to certain "criteria" which were being applied, during 1962, by the Nuclear

Regulatory Commissioners under the terms of an AEC Regulation 50.59.[4]

The Petitioners point to this single piece of legislative history as allegedly dispositive evidence that the 87th Congress, in sentence four of its 1962 amendment, intended to authorize the NRC Commissioners *to refuse public hearings*, upon an internal NRC staff finding of "no significant hazards consideration" despite the fact that the clear language of sentence four of the amendment, upon such a finding, authorized *only* the waiver of the full *30-day* notice and publication period before allowing the licensee to undertake action pursuant to such an NRC-approved amendment — so long as that proposed amendment went uncontested and no public hearing had been requested. The very *waiver of this full 30-day waiting period* was what was set forth in AEC Reg. 50.59 referred to by the Congress.

The Petitioners demand that the Court draw an entirely *indirect* inference as to exactly what particular procedural "criterion" the 87th Congress was referring to by its oblique reference contained on page 8 of the Joint Committee Report when a *direct* examination of the precise procedures authorized by the Joint Committee are set forth on the face of that Report. These are as follow:

> Under this plan (set forth in §189(a), the issuance of . . . operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of a public hearing. *In the absence of a request for a hearing,* issuance of . . . an operating license, or an amendment to an operating license, would be possible without a formal proceeding, but on the public record. It will *also* be possible for the

[4] 10 C.F.R. 50.59, published on June 9, 1962 at 27 Fed. Reg. 5492-5493.

> Commission to dispense with the *30-day* notice requirement where the application presents "no significant hazards consideration." *This criterion* is presently being applied by the Commission under the terms of AEC Regulation 50.59. H.R. Rep. No. 1966, 87th Cong., 2nd Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2nd Sess. 8 (1962). (emphasis added)

A review of this statement of policy by the 87th Congress makes it clear that the Congress was saying that the NRC was being authorized, by the 1962 amendments to the 1954 Act, to allow licensees to undertake action on a proposed operating license amendment, as a final order, *in the absence of a request for a hearing* "without a formal proceeding" (i.e. without a prior public hearing) and *"also"* without the full 30-day notice requirement where the application presents no significant hazards consideration (as determined by an internal NRC staff finding). *This* is the "this criterion" to which the Joint Committee was referring in the sentence so heavily relied upon by the Petitioners.

In short, this argument of the Petitioners does *not* outweigh the vast quantities of legislative history directly to the contrary of their contention marshalled by the Court below to support its judgment that the 87th Congress did *not* intend, by its language set forth in "sentence four" of the 1962 amendments to the Atomic Energy Act of 1954, to strip American citizens of their right to a prior public hearing on proposed amendments to the operating license of nuclear reactors — when those citizens were persons whose interests might be affected by such proposed amendments and they had formally demanded such a hearing prior to the time the licensee had begun to undertake action pursuant to the NRC's approval of the proposed amendment.

ARGUMENT II

SENTENCE FOUR OF THE 1962 AMENDMENTS TO THE ATOMIC ENERGY ACT OF 1954 WAS INTENDED BY CONGRESS TO AUTHORIZE, UPON A FINDING BY THE NRC STAFF THAT A PROPOSED LICENSE AMENDMENT INVOLVED "NO SIGNIFICANT HAZARDS CONSIDERATION," *ONLY* THE ELIMINATION OF THE FULL *30-DAY* NOTICE AND PUBLICATION PERIOD REQUIRED BY THE EARLIER ACT TO PRECEED ACTION BY THE LICENSEE PURSUANT TO THE PROPOSED AMENDMENT — "IN THE ABSENCE OF A REQUEST FOR A HEARING"

Argument I, set forth above, explicates the legislative history of the 1962 amendment to §189(a) of the Atomic Energy Act of 1954 which makes it clear that the 87th Congress which considered, and passed, these 1962 amendments intended to eliminate mandatory public hearings, prior to the NRC's finalization of a proposed amendment of operating licenses of nuclear facilities, *only* in those instances in which such proposed amendments were *uncontested* by persons whose interests might be affected by said proposed amendments.

This still left the Nuclear Regulatory Commission faced with a 1954 statutory requirement that it delay licensee action to be undertaken pursuant to a proposed operating license amendment for a full 30 day period — even in those instances when the proposed amendment *was* entirely uncontested by all persons whose interests might be affected by the proposed amendment.

For this reason, the 87th Congress expressly authorized the NRC to waive the full *30-day* notice and publication period in instances in which the NRC staff had made a determination that "no significant hazards consideration" were involved in the proposed operating license amendment — so long as no person whose interests might be affected by the proposed amendment had formally requested a hearing.

As was pointed out by the American Bar Association, during the 1962 Hearings into the proposed amendments to §189(a) of the Atomic Energy Act,

> 14 out of 15 of [the Atomic Energy Commission's] cases have been *uncontested.* (AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2nd Sess. 64 (1962) (Statement of Raoul Berger)

This meant that the elimination of the full 30-day notice and publication period mandated by the 1954 Act, in those cases which did not involve potential health and safety problems, would allow the NRC to proceed immediately to the implementing of proposed nuclear operating license amendments in *98%* of the proposed license amendment cases.

Surely, this was a significant, and beneficial, change from the 1954 Act which would almost entirely accommodate the NRC, which was, up to 1962, being forced by the express terms of the 1954 Act to delay licensee action on *all* proposed nuclear operating license amendments for a full 30 days — when only a tiny fraction of such proposed amendments (approximately 2%) *really* needed to await any prior hearing.

After the 1962 amendments of the Act of 1954 here under discussion, there were only two small categories of proposed nuclear operating license amendments whose implementation by the licensee would have to await a full 30-day notice period or be preceeded by a public hearing. These would be (a) *all* proposed nuclear operating license amendments which had been expressly challenged[5] (in

[5] i.e. all those proposed license amendment cases with regard to which "persons whose interests might be affected by the proposed license amendment" *had* formally demanded a prior public hearing.

which hearings would have to be held) *and* all proposed nuclear operator license amendments with regard to which the NRC staff had *not* made a specific finding that said proposed license amendment involved "no significant hazards consideration" (implementation of which would have to await the expiration of the full 30-day notice and publication period.)

This is the entirely logical import, and explanation, of the 87th Congress' 1962 amendment to the Atomic Energy Act of 1954. The NRC, in the case before the Court, is simply faced with an infrequent example of a case in which its staff *has* made an internal decision to the effect that a given proposed operating license amendment involved "no significant hazards considerations" (thus, theoretically, authorizing the NRC to avoid the full 30-day notice and publication period) but in which interested citizens have *still* formally demanded a public hearing prior to the implementation of the NRC's proposed license amendment.

While this case may well be one of those rare cases which falls into one of the interstices of the Act not expressly discussed by the 1962 amendment of the Act, the Petitioners' argument that the 87th Congress somehow expressly intended to *take away* from citizens their right to such a demanded public hearing which right was expressly recognized to exist in the 1954 Act is totally unsupported by the Petitioners' distorted argument to the effect that "sentence four" of the 1962 amendment makes no sense if citizens are allowed their hearing upon demand, even if the NRC is not required to give them a full 30-day's notice. (NRC Petition, p. 13, Metropolitan Edison Petition, pp. 11-13.)

The Circuit Court's interpretation of Congress' 1962 amendment makes perfect sense and relieved the NRC

of the need to hold public hearings or to await the expiration of a full 30-day notice and publication period in almost 98% of the license amendment cases.

ARGUMENT III

THE CIRCUIT COURT OF APPEALS BELOW ACCORDED THE HISTORICAL INTERPRETATION GIVEN TO §189(a) OF THE ATOMIC ENERGY ACT BY THE NUCLEAR REGULATORY COMMISSION ADEQUATE LEGAL CONSIDERATION

Both the NRC and the licensee Intervenors argue that the Circuit Court below disregarded a perfectly clear administrative interpretation given to §189(a) by the NRC over a 20-year period and that the Circuit Court held §189(a) and its legislative history to be "unambiguous" — despite the Circuit Court's earlier observation that "the text and legislative history of the section are replete with ambiguities and inconsistencies." (e.g. Metropolitan Edison Petition, pp. 13-14, Fn. 14).

In fact, the Circuit Court below ruled that it was the "history of regulations and administrative practice by the AEC and the NRC" that were ambiguous[6] (*not* clear and consistent, as the Petitioners suggest) and the Circuit Court found that §189(a) and its legislative history were "unambiguous" *insofar as* the statute's provision was concerned which provided that a finding of no significant hazards consideration was *not* intended to permit the NRC to dispense with a demanded public hearing. (NRC Petition, App. A, p. 20(a), Fn. 24)

This set of facts presents this Court with a legal situation considerably different than that which the Petitioners suggest and the situation in which appellate

---

[6] Circuit Court opinion, NRC Petition, App. A, p. 22(a), Fn. 26.

courts have disturbed judicial tribunals' efforts to interject their interpretation of an *ambiguous* statute in the stead of an administrative agency's *clear and consistent* interpretation of such a statute.

The Court of Appeals in this case was presented with an ambiguous and confusing administrative interpretation of §189(a) by the NRC and with a provision of §189(a) which was entirely clear with regard to the precise issue which was presented to the Court for decision. Therefore, the Court below was correct when it ruled that such "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing to construction. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933)" (Circuit Court Opinion, NRC Petition, App. A, p. 22(a), Fn. 26)

ARGUMENT IV

THE PRACTICAL IMPACT OF THE CIRCUIT COURT'S DECISION BELOW IS MISREPRESENTED, AND THEREBY VASTLY OVERSTATED, BY THE NRC AND DOES NOT AFFORD THE PETITIONERS ANY SUPPORT FOR THEIR DEMAND THAT THIS COURT REVIEW, AND REVERSE, THE CIRCUIT COURT'S DECISION BELOW

Both the NRC, at pp. 15-17 of its Petition, and the Licensee Intervenor, at pp. 14-16 of its Petition, argue that the Circuit Court's ruling below will "impose substantial and novel administrative burdens on the Commission,"[7] will "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both,"[8] will "have a dramatic impact on the administrative machinery for regulation of nuclear plants,"[9] and will pose a "monumental disruption of the

[7] NRC Petition, p. 15.

[8] Loc. Cit.

[9] Metropolitan Edison Petition, p. 14-15.

Commission's current license amendment review process."[10] In short, the Petitioners argue that the Supreme Court's refusal to set aside the Circuit Court's ruling below will "significantly undermine the public interest,"[11] by requiring the NRC to shut down numerous nuclear plants, while this entirely unnecessary hearing process runs its course.[12]

The short answer to this parade of fantasized horrors is given by the Respondents in the information set forth in Argument II above. This is that the Circuit Court's opinion below does *not* require the NRC to provide a "nine month" processing of each "no hazards" amendment application, as the NRC disingenuously complains at page 15 of its Petition. As Respondents pointed out in Argument II above, all available evidence demonstrates that *less than 2%* of the NRC's proposed nuclear operating license amendments are ever challenged. (See American Bar Association testimony before Congress cited above at p. 13). It is only such *challenged* proposed license amendments that would require public hearings before their implementation. And it is only those proposed license amendments that involve potential "significant hazards consideration" (no matter what the NRC staff might adversarily determine in this regard) that are likely to draw challenges. This is clearly exactly what the 87th Congress which "tuned" §189(a) in 1962 expected.

The Petitioners bizarrely argue that the Court's decision below somehow mandates a full public hearing

[10] Loc. Cit.

[11] Loc. Cit.

[12] Loc. Cit.

every time the NRC staff determines that a given proposed operating license amendment involves "no significant hazards consideration." Metropolitan Edison at page 14 of its Petition, points out that:

> [I]n the last four calendar years, the Commission has published in the *Federal Register* notice of more than 1500 license amendments which fall into this category (those which are found by the NRC staff to present no significant hazards consideration).

Metropolitan Edison then goes on to suggest that the Circuit Court's interpretation of §189(a) below

> . . . might necessitate Commission hearings on such a large scale [and] would have a dramatic impact on the administrative machinery for regulation of nuclear plants.

This entirely disingenuous level of argument is only too characteristic of the performance of the licensee and the NRC in this case.

For it is clear that the Circuit Court's ruling below necessitates no such thing. Its ruling requires a public hearing only when such a hearing is formally demanded by citizens whose interests might be affected by proposed nuclear facility operating licenses — exactly as the 87th Congress intended.

The Circuit Court's ruling below does *not* require such a public hearing every time the NRC staff internally determines that a proposed operating license amendment involves "no significant hazards consideration," as the Petitioners suggest.

In short, an analysis of the Circuit Court's ruling characterized by any integrity at all totally belies the Petitioners' prognostications of administrative paralysis and plant closings. Such arguments constitute no credible

support for the Petitioners' demand that this Court review, and reverse, the Circuit Court's decision below in this case.

CONCLUSION

This Supreme Court should reject all four of the Petitioners' arguments made in support of their demand that this Court review, and reverse, the decision below of the Circuit Court. Their Petition should be denied.

DATED: May 5, 1981

Respectfully submitted,

DANIEL P. SHEEHAN
Counsel of Record
ROBERT HAGER
1324 N. Capitol St.
Washington, D.C. 20002
(202) 797-8106
Counsel for Respondents